Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

80-1099

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

STATE OF ALABAMA,

PETITIONER

VERSUS

BILLY BATTLES,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDICIES

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QUESTION PRESENTED

On review of a grant of extradition of a party to answer charges brought by formal verified Information, may the Courts of the asylum State nullify the executive grant of extradition on the grounds that the papers submitted by the demanding state show neither a judicial determination of probable cause nor facts constituting probable cause?

PARTIES

In the Supreme Court and Court of Criminal Appeals of Alabama, the parties were: Billy Battles and the State of Alabama. Although neither party nor a participant in this litigation, the State of Florida is an interested party, since at issue in this litigation is the right of the Governor of Alabama to grant the request of the Governor of Florida for the extradition of Billy Battles to Florida to answer charges in that state.

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OPINIONS BELOW

The judgment of the Circuit Court of Etowah County, Alabama, denying the writ of habeas corpus to Battles is not reported but is submitted as Appendix "A" hereto.

The judgment and opinion of the Court of Criminal Appeals of Alabama reversing the judgment of the Circuit Court is submitted as Appendix "B" hereto and is or will be reported as: Battles v. State, (Cr. App. Ala., 1980) ___ So. 2d ___.

The order of the Supreme Court of Alabama denying the writ of certiorari to the State of Alabama is submitted as Appendix "C" hereto and is or will be reported as: Ex parte State. In Re: Battles v. State, (S. Ct. Ala., 1980) ___ So. 2d ___.

JURISDICTION

The opinion of the Court of Criminal Appeals ordering Battles' release on writ of habeas cor-

pus was issued July 29, 1980, and rehearing was denied on August 19, 1980. The Alabama Supreme Court declined to review said opinion on October 31, 1980, and this petition is filed within ninety days of said date.

The Jurisdiction of this Honorable Court is invoked under Title 28 United State's Code, Section 1257 (3), this case presenting the question of the right or privilege of the Governor of Alabama under the Constitution to extradict the Respondent Battles to the State of Florida.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 2, Clause 2 of the Constitution of the United States which reads:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

STATEMENT OF THE CASE

On September 19, 1979, the Governor of Florida requested the extradition of Respondent Billy Battles from Alabama. Submitted with Florida's request were: a verified Information charging Battles with two felonies allegedly committed by him while he was present in Florida, A warrant, an affidavit before a Florida Magistrate, the request of the Florida prosecutor for Battles' extradition and various certifications. There was no formal statement by the Florida Magistrate finding probable cause. (R. pp. 56-53)

On October 11, 1979, the Governor of Alabama ordered Battles' extradition to Florida ". . .in obedience to the Constitution and the laws of the United States. . . ." (R. p. 54)

On October 17, 1979, Battles filed a petition for a writ of habeas corpus in the Circuit Court of Etowah County of Alabama, which after a hearing, denied the writ on December 18, 1979. (R. pp. 1-37 and Appendix "A")

Appeal was taken to the Court of Criminal Appeals of Alabama, which on July 29, 1980, reversed and ordered the writ issued. The reason for the Court's decision was that the Florida extradition papers contained neither a formal finding of probable cause nor sufficient facts to show probable cause. (R. p. 38 and Battles v. State, [Cr. App. Ala., 1980] ___ So. 2d ___, Appendix "B")

Within the time required by Alabama law, the State of Alabama applied for rehearing raising the matters raised in the instant petition. The State pointed out that the decision and opinion of the Court of Criminal Appeals was contrary to the Constitutional policies as established by this Honorable Court. Michigan v. Doran, (439 U.S. 282, 58 L. Ed. 2d 521, 99 S. Ct. 530 [1978]) was particularly called to the Court's attention. The State's application for rehearing was overruled on August 19, 1980, without opinion. The State applied to the Supreme Court of Alabama for a writ of

certiorari, again raising the matters relating to Michigan v. Doran, supra. The Alabama Supreme Court denied the writ without opinion on October 31, 1980. (Battles v. State, [S. Ct. Ala., 1980] ___ So. 2d ___ Appendix "C")

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS A NOVEL QUESTION

In Michigan v. Doran (439 U.S. 282, 58 L. Ed. 2d 521, 99 S. Ct. 530 [1978]) this Honorable Court held that the Courts of an asylum State could not nullify an executive grant of extradition on the grounds that the extradition papers did not show sufficient facts to support a judicial determination of probable cause by the Courts of the demanding State. However, this Honorable Court in that case declined to decide whether a finding of probable cause must

be recited in the extradition papers.[1] This case presents a charge brought by a formal Information filed by a Florida prosecuting attorney. The Information is verified by oath and the prosecutor swears that his allegations are based on facts which have been sworn to as true. (R. p. 50) The filing of this Information caused the automatic issuance of an arrest warrant by the

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1 ". . .3. In Gerstein [v. Pugh (420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 [1975])] we held that 'the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.' 420 US, at 114, 43 L. Ed. 2d 54, 95 S. Ct. 854. Because Arizona provided a judicial determination of probable cause for the arrest warrant, we need not decide whether the criminal charge on which extradition is requested must recite that it was based on a finding of probable cause. . . ." (439 U.S. 282, 285, 58 L. Ed. 2d 521, 525)

Clerk of the Court.[2] (R. p. 52) See West's Florida Statutes Annotated, Section 932.48. In support of the extradition an "Application Of Probable Cause" was made under oath before a Florida Judge. (R. p. 48) However, the extradition papers contain no formal recitation to the effect that a Florida Judge found probable cause. This case, then, presents the question which this Honorable Court saw no need to decide in Michigan v. Doran, above.

It is essential to understand that what is at issue here is not the Respondent's right to a probable cause determination. This right is well established under the Constitution (Gerstein v. Pugh, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 [1975]) and Florida law (Rule

---

[2]The writer of this petition is an Alabama Attorney who is trained and experienced in Alabama and Federal Criminal procedure but who frankly has no training or experience in Florida substantive or procedural law. Therefore, all statements in this petition relating to Florida law are based on this writer's knowledge and belief as a result of legal research.

3.131 Florida Rules of Criminal Procedure, Appendix "D"). What is at issue here is where, when, how and by whom this determination should be made.

Clearly, this case presents ". . .an important question of federal [Constitutional] law which has not been, but should be settled by this Court. . . ." Rule 17(c), Rules of the Supreme Court.

II.

THE DECISION AND OPINION OF THE ALABAMA COURTS IS CONTRARY TO THE POLICIES OF THIS HONORABLE COURT

Although the decision of the Alabama Court of Criminal Appeals is not in exact conflict any prior opinion of this Honorable Court, the decision is contrary to certain well-established policies of this Honorable Court.

A.

THE POLICY OF LIMITING THE ISSUES TRIALABLE IN THE ASYLUM STATE

Article IV, Section 2, Clause 2, of the United States Constitution is on its face clear and mandatory. Where a person is charged in one state and had fled to another state, he shall be delivered up on demand of the state where the charge is lodged. No mention is made of any power in the Courts of the asylum State to interfere with the delivering up. However, certain limited interference by the Courts of the asylum state has been allowed. The only justification for such interference was that in former times removing a person from one state to another usually involved considerable time, hardship and danger. Such considerations, of course, no longer obtain. Yet, from the beginning of our Republic the extent to which the Courts of the asylum State could review the extradition procedures has been extremely limited.

There is no right at all to a hearing in the asylum state. Pettibone v. Nichols, 203 U.S. 192, 51 L. Ed. 148, 27 S. Ct. 111 (1906). The Courts of the asylum state may not resolve conflicting evidence of the prisoner's presence in the demanding state. Munsey v. Clough, 196 U.S. 364, 49 L. Ed. 515, 26 S. Ct. 282 (1905) The propriety of a judicial determination of probable cause by the Courts of the demanding state may not be reviewed by the Courts of the asylum State. Michigan v. Doran, 439 U.S. 282, 58 L. Ed. 2d 521, 99 S. Ct. 530 (1978) Where there is conflicting evidence, the courts of the asylum state may not sit on the jurisdiction of the demanding Jurisdiction. Rodman v. Pothier, 264 U.S. 399, 68 L. Ed. 759, 44 S. Ct. 360 (1924) The technical sufficiency of the accusation is not open to review by the Courts of the asylum state. Munsey v. Clough, above. Defenses such as the statute of limitations or insanity are not available in the asylum state. Biddinger v. Commissioner, 245 U.S. 128, 62 L.

Ed. 193, 38 S. Ct. 41 (1917); Drew v. Thaw, 235 U.S. 432, 59 L. Ed. 302, 35 S. Ct. 137 (1914)

The reason for these limitations two fold. First, as stated by Mr. Justice Clark in Biddinger, above,

> ". . .Courts have been free to give this meaning [i.e., limiting inquiry in the asylum state] to the Constitution and statutes because, in delivering up an accused person to the authorities of a sister state, they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried. Still under the protection of the Federal Constitution, but in the manner provided by the state against the laws of which it is charged that he has offended. . . ." (245 U.S. 128, 133 62 L. Ed. 193, 198)

The Second consideration is that factual matters are invariably intimately tied to the law of the demanding state. See Drew v. Thaw, 235 U.S. 432, 440, 59 L. Ed. 302, 307, 35 S. Ct. 137 (1914)

In the instant case, the Courts of Florida are as concerned with protecting Battle's constitutional rights as those of Alabama. The

question of whether there is sufficient probable cause to detain Battles is intimately related to Florida law, e.g. the corpus delecti of the charged crimes. Therefore, it would appear that Battles should as a matter of policy be required to present this question to the Florida Courts. Any other approach ". . .would defeat the plain purposes of the summary and mandatory procedures authorized by Art IV, §2. . . ." Michigan v. Doran, 439 U.S. 282, 290, 58 L. Ed. 2d 521, 528 99 S. Ct. 530 (1978)

B.

THE POLICY OF SPEEDY DETERMINATION OF ISSUES IN CRIMINAL CASES

A strong constitutional policy of our Republic is embodied in the principle: "Justice delayed is justice denied." The right to a speedy trial is a pillar of the Bill of Rights, U.S. Constitution, Amendment Six. The right to be protected from extended detention without a judicial determination of probable cause was

established in Gerstein v. Pugh, (420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 [1975]). This Honorable Court has recognized that the society too has an interest in speedy determination of criminal controversies. Barker v. Wingo, 407 U.S. 514, 521, 33 L. Ed. 2d 101, 111, 92 S. Ct. 2182 (1972) Since allowing the asylum state to inquire into probable cause delays justice, it contrary to the policy of speedy determination.

In the instant case, Battles was charged by an Information filed August 20, 1979; the warrant for his arrest was issued three days later. (R. pp. 50 & 52) The request for Battles extradition was made by the Governor of Florida less than a month later and granted by the Alabama Governor less than a month after that. (R. pp. 46 & 54) Had Battles been extradicted at that point he would long ago have had his probable cause hearing under Rule 3.131 F.R.C.P. (Appendix "D") and if there was insufficient probable cause, been discharged. Yet, here

a year later the Florida charges and the question of probable cause are still pending. During most of this time Battles has been restrained of his liberty in an Alabama jail or on bond. Even now, Battles is still under the threat of prosecution if he goes to Florida or to another state which will extradict him. Even if he remains within Alabama, he is subject to extradition if Florida can produce a more detailed affidavit or a judicial determination of probable cause with a new set of extradition papers. Whom does this profit? Obviously, Battles, Florida and Alabama, whose courts have borne the burden of this litigation, would be better off if Battles had been required to litigate the question of probable cause in Florida a year ago.

For all of these reasons, the State of Alabama respectfully submits that the question of probable cause ought to be litigated solely in the demanding state.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, respectfully submits that this case presents an important question of Federal Constitutional Law which has not been but ought to be decided by this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision and opinion of the Honorable Court of Criminal Appeals of Alabama and on such review will reverse the decision of said Court discharging the Petitioner.

Respectfully submitted,

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ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OF COUNSEL:
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ASSISTANT ATTORNEY GENERAL
OF ALABAMA

WILLIAM H. TURNER
LEGAL RESEARCH AIDE
OF ALABAMA

APPENDICIES

APPENDIX A

JUDGMENT ENTRY BY HONORABLE JULIUS S. SWANN, A JUDGE OF THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA, IN:

BILLY BATTLES v. STATE OF ALABAMA
No. CC-79-000803

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

On this the 18th day of December, 1979, comes the State by its District Attorney, and the defendant in open Court in person and by its attorney representing him, and It is therefore ordered and adjudged by the Court that the Petition for Writ of Habeas Corpus be and the same is hereby denied.

APPENDIX B

JUL 29 1980

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

7 Div. 733

Billy Battles

v

State

Appeal from Etowah Circuit Court

TYSON, JUDGE

This was an appeal from a judgment denying appellant's discharge in a habeas corpus proceeding after a hearing on extradition papers from the State of Florida.

The State of Florida, through its Governor, has sent a requisition warrant, accompanied by

an information from the State's attorney for the Fourteenth Judicial Circuit of Florida, which information is in two counts. The first count charged Billy Battles with obtaining a vehicle with intent to defraud, and the second charged Billy Battles with passing a worthless check. Both of these counts arise according to the information from the same transaction in which Billy Battles obtained a 1974 Ford, Serial Number 4N54H118242, from a dealer in Florida by the name of Larry L. Stimmett. The information asserts that the check given Stimmett was on a closed bank account.

The second count of the information asserts that Billy Battles did, on July 1, 1979, in Bay County, Florida, issue a check for $1300.00 to Larry L. Stimmett, drawn on the Sand Mountain Bank of Boaz, Alabama, which check is dated July 29, 1979, knowing at the time of making, or uttering, or issuing such check that there were not sufficient funds on deposit or credit with the said bank to cover the check in question.

The trial court, pursuant to a petition for writ of habeas corpus filed by the appellant's attorney, conducted a hearing on the validity of the extradition papers, and all of the papers from the State of Florida were placed in evidence before the Circuit Judge. The appellant testified himself and stated that he advised Mr. Stimmett that there were not sufficient funds on deposit when he discussed the purchase of the car in Bay County, Florida, on July 1, 1979, but indicated that the transaction occurred on a Sunday, and that he wanted to drive the vehicle back to Gadsden, Alabama, and would place the funds on deposit to cover the check. He said he so advised Stimmett at the time. The appellant contended that Stimmett allowed him to drive the 1974 Ford back to Gadsden with this understanding, and that he subsequently developed car trouble in driving back and contacted Mr. Stimmett in Florida and so advised him.

The appellant also admitted on cross-examnation that he later sold the automobile to one Charlie New.

In resisting the extradition to Florida, the appellant, through his counsel, calls the attention of this Court to the provisions of §15-9-31 and §15-9-33, Code of Alabama 1975, which are as follows:

> "§15-9-31. Form of Demand.
>
> "No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing and accompanied by a copy of an indictment found, or by an information supported by affidavit, in the state having jurisdiction of the crime or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state, and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth."
>
> "§15-9-33. What supporting documents to show.
>
> "A warrant of extradition must not be issued unless the docu-

> ments presented by the executive authority making the demand show that the accused was present in the demanding state at the time of the commission of the alleged crime and that he thereafter fled from that state and is now in this state, and that he is lawfully charged by indictment or by an information filed by a prosecuting officer and supported by affidavit to the facts, or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state, or that he has been convicted of crime in that state and has escaped from confinement or broken his parole."

Specifically, counsel for the appellant calls our attention to the fact that there is no affidavit attached to the information which is contained in the extradition papers; and, secondly, that the affidavit, which is made by an investigator of the office of the state's attorney in Bay County, Florida, is dated eleven days <u>after</u> the information, and is attached to the "application for requisition," which is dated August 30, 1979, some ten days <u>after</u> the information contained in the extradition papers. Appellant's counsel also calls our attention to

the fact that the investigator who signed the affidavit has "no personal knowledge of the facts alleged," nor does the affidavit disclose the source of the information or the reliability of the source.

Finally, counsel asserts that such affidavit is a conclusionary affidavit and that, in order for an information to be valid, such should be accompanied by a sworn affidavit by the party having personal knowledge of the facts asserted.

I

Where, as here, the allied papers accompanying the requisition warrant from the Governor of a foreign state are placed in evidence at the habeas corpus hearing, then there is a duty on the part of the trial court and the appellate court on subsequent review to look to their legal sufficiency to justify the issuance of the rendition warrant. Aldio v. State, 44 Ala. App. 303, 208 So. 2d 212 (1967); Martin v. State, 50 Ala. App. 1, 276 So. 2d 149 (1973); Watson v. State,

30 Ala. App. 184, 2 So. 2d 470 (1941); and Meadows v. State, 38 Ala. App. 319, 82 So. 2d 811 (1955).

Section 15-9-31, Code of Alabama 1975, clearly requires that there shall be attached to the requisition warrant from the Governor of the foreign state a certified copy of any indictment found or by information supported by affidavit in the state having jurisdiction of the crime or by copy of an affidavit made before a magistrate there, together with a copy of any warrant issued thereon.

The two-count information by the state's attorney of the Fourteenth Judicial Circuit of Florida is dated and certified by the clerk of the Bay County, Florida, Court, under date of August 20, 1979. There is no affidavit or warrant attached to this information.

There is an "application for requisition" directed to the Governor of Florida by the state's attorney of Bay County, dated, sworn to, and certified to under date of August 30, 1979,

seeking the extradition of Billy Battles and asserting that there is an information which was attached, but the record does not show that there was an affidavit attached to the information. Rather, the affidavit in the instant cause is dated, sworn to, and certified to by the clerk of the Circuit Court of Bay County, Florida, all under date of August 31, 1979, and reads as follows (R. 48):

> "IN THE COUNTY COURT IN AND FOR BAY COUNTY, FLORIDA
>
> | | |
> |---|---|
> | "STATE OF FLORIDA | APPLICATION OF PROBABLE CAUSE |
> | vs | |
> | BILLY BATTLES | |
>
> ---
>
> "STATE OF FLORIDA
> COUNTY OF BAY
>
> "Personally appeared before me, one of the Judges of the above-styled Court and a magistrate under the law of the State of Florida, Jimmy Cauley, Investigator with the Office of State Attorney, Fourteenth Judicial Circuit, Panama City, Bay County, Florida, here being first duly sworn, deposes and says under oath:

"That I, Jimmy Cauley, am over the age of 18 years, a resident of the State of Florida, emancipated and competent to duly take an oath.

"That in my capacity as an investigator with the Office of the State Attorney, Fourteenth Judicial Circuit, I had the opportunity to investigate the criminal offense for which the aforesaid, Billy Battles, is charged and during the course of my investigation, I obtained the following facts:

"As to Count I: Billy Battles, on or about the 1st day of July, 1979, in County and State aforesaid, did unlawfully obtain custody of a motor vehicle by trick, deceit, fraudulent or willful false representation, with the intent to defraud the owner or any person lawfully possessing the motor vehicle, to-wit: the defendant obtained custody of a 1974 Ford, serial number 4N54H118242, from the owner thereof, Larry L. Stimmett, by fraudulently purchasing vehicle with a personal check on a closed bank account.

"As to Count II: Billy Battles, on or about the 1st day of July, 1979, in County and State aforesaid, did unlawfully draw, make, utter, issue or deliver to another person a certain check or written order or draft on a bank or de-

pository for the payment of money or its equivalent, the said defendant well knowing at the time of drawing, making, uttering, issuing or delivering of such check or written order, or draft, that the maker or drawer thereof did not have sufficient funds on deposit in or credit with the said bank or depository with which to pay the same on presentation, contrary to Florida Statutes, Section 832.05, said check or written order being in the following words and figures: "Pay to the Order of Larry L. Stimmett, in the amount of $1300.00, Thirteen hundred and 00/100, drawn on the Sand Mountain Bank, Boaz, Alabama, dated July 29, 1979, and signed Billy Battles," and did receive something of value in exchange therefor.

"Affiant makes this affidavit in support and in aid of the extradition of the said defendant, Billy Battles.

S/ Jimmy Cauley
Jimmy Cauley

"Sworn and subscribed before me this 31st day of August, 1979.

"S/ Don T. Sirmons
County Judge in and for
Bay County, Florida

This Court is of the opinion that this affidavit is not sufficient in law to support the information which is dated some eleven days earlier and is not attached to such information, but, rather, is attached to an "application for requisition," dated August 30, 1979, and directed to the Governor of Florida.

Moreover, the affidavit in question is made by the investigator for the State's attorney's office, and there is no showing of any personal knowledge on his part of the source, or reliability of the facts asserted in the affidavit. Nowhere in the record is there an affidavit of one Larry L. Stimmett to whom it is alleged the appellant gave a worthless check.

In this state of the record, we cannot in good conscience conclude that the State of Florida had satisfied the requirements of our statute. See Raburn v. State, Ala. Cr. App., 366 So. 2d 698, affirmed, Ala., 366 So. 2d 708 (1978).

The facts presented by this record under review, having failed to show that the appellant is prima facie under a legal restraint, require therefore that a reversal of this cause must be ordered.

REVERSED AND REMANDED.

All the Judges concur.

APPENDIX C

OCT. 31, 1980

ORDER OF THE SUPREME
COURT OF ALABAMA

79-902

EX PARTE: STATE OF ALABAMA, EX REL. ATTORNEY GENERAL
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Billy Battles vs. State of Alabama)

The Petition for Writ of Certiorari to the Court of Criminal Appeals having been duly submitted to the Court, IT IS CONSIDERED AND ORDERED that the petition be denied. NO COSTS TAXED.

EMBRY, J.
TORBERT, C.J., FAULKNER, JONES AND ADAMS, JJ., CONCUR.

APPENDIX D

FLORIDA RULES OF CRIMINAL PROCEDURE

RULE 3.131. PRETRIAL PROBABLE CAUSE DETERMINATIONS AND ADVERSARY PRELIMINARY HEARINGS

(a) Nonadversary Probable Cause Determination.

(1) Defendants in Custody. In all cases where the defendant is in custody, a nonadversary probable cause determination shall be held before a magistrate within 72 hours from the time of the defendant's arrest; provided, however, that this proceeding shall not be required when a probable cause determination has been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. The magistrate for good cause may continue the proceeding for not more than 24 hours beyond the above 72 hour period. This determination shall be made if the necessary proof is available at the time of the first appearance as required under Rule 3.130, but the holding of this determination at said time shall not affect the fact that it is a nonadversary proceeding.

(2) Defendants on Pretrial Release. A defendant who has been released from custody before a probable cause determination is made and who is able to establish that his pretrial release conditions are a significant restraint on his liberty may file a written motion for a nonadversary probable cause determination setting forth with specificity the items of significant restraint that a finding of no probable cause would eliminate. The motion shall be filed within 21 days from the date of arrest, and notice shall be given to the State. The magistrate shall, if he finds significant restraints on the defendant's liberty, make a probable cause determination within 7 days from the filing of the motion.

(3) Standard of Proof. Upon presentation of proof, the magistrate shall determine whether there is probable cause for detaining the arrested person pending further proceedings. The defendant need not be present. In determining probable cause to detain the defendant, the magistrate shall apply the standard for issuance of an arrest warrant, and his finding may be based upon sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded.

(4) Action on Determination. If probable cause is found, the defendant shall be held to answer the charges. If probable cause is not found or the specified time periods are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Any release occasioned by a failure to comply with the specified time periods shall be by order of the magistrate upon a written application filed by the defendant with notice sent to the state or by a magistrate without a written application but with notice to the state. The magistrate shall order the release of the defendant after it is determined that the defendant is entitled to release and after the state has a reasonable period of time, not to exceed 24 hours, in which to establish probable cause. A release required by this rule does not void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. A finding that pro-

bable cause does or does not exist shall be made in writing, signed by the magistrate, and filed, together with the evidence of such probable cause, with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

(b) Adversary Preliminary Hearing.

(1) When Applicable. A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

(2) Process. The magistrate shall issue such process as may be necessary to secure attendance of witnesses within the state for the state or the defendant.

(3) Witnesses. All witnesses shall be examined in the presence of the defendant and may be cross-examined. Either party may request that the witnesses be sequestered. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn

and testify in his own behalf, and in such cases he shall be warned in advance of testifying that anything he may say can be used against him at a subsequent trial. He may be cross-examined in the same manner as other witnesses, and any witnesses offered by him shall be sworn and examined.

(4) Record. At the request of either party, the entire preliminary hearing, including all testimony, shall be recorded verbatim stenographically or by mechanical means, and at the request of either party shall be transcribed. If the record of the proceedings, or any part thereof, is transcribed at the request of the prosecuting attorney, a copy of this transcript shall be furnished free of cost to defendant or his counsel.

(5) Action on Hearing. If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall cause the defendant to be held to answer to the circuit court; otherwise the magistrate shall release the defendant from custody unless an information or indictment has been filed, in which event the defendant shall

be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial.

A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and, together with the evidence received in the cause, shall be filed with the clerk of the circuit court.

(c) Additional Nonadversary Probable Cause Determinations and Preliminary Hearings. If there has been a finding of no probable cause at a nonadversary determination or adversary preliminary hearing, or if the specified time periods for holding a nonadversary probable cause determination have not been complied with, a magistrate may thereafter make a determination of probable cause at a nonadversary probable cause determination, in which event the defendant shall be retained in custody or returned to custody upon appropriate process issued by the magistrate. A defendant who has been retained

in custody or returned to custody by such a determination shall be allowed an adversary preliminary hearing in all instances in which a felony offense is charged.

(d) Summoning of Witnesses. The magistrate shall issue such process as may be necessary to secure attendance of witnesses within the state, for the state or the defendant.

(e) Presence of Defendant and Cross-Examination of Witnesses. All witnesses shall be examined in the presence of the defendant and may be cross-examined.

(f) Examination of Witnesses for Defendant. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf, and in such cases be rewarned in advance that anything he may say can be used against him at a subsequent trial. He may be cross-examined as other witnesses, and any witness offered by him shall be sworn and examined.

(g) Exclusion of Witnesses at Defendant's Request. Prior to the examination of any witnesss in the cause, the magistrate may, and on the request of the defendant shall, exclude all other witnesses. The magistrate also may cause the wit-

nesses to be kept separate and to be prevented from communicating with each other until all are examined.

(h) Record of the Proceedings. At the request of either party, the entire preliminary hearing, including all testimony, shall be recorded verbatim stenographically or by mechanical means, and at the request of either party shall be transcribed. If the record of the proceedings, or any part thereof, is transcribed at the request of the prosecuting attorney, a copy of this transcript shall be furnished free of cost to defendant or his counsel.

(i) Action After Hearing. If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold the defendant to answer to the circuit court; otherwise, the magistrate shall discharge him.

(j) Transmission of Papers by Magistrate.

(1) Where the magistrate has discharged the defendant, or has held him to answer, he shall transmit within three days thereafter to the clerk of the circuit court:

(i) The complaint and warrant;

(ii) The recognizance or undertaking for the appearance of witnesses;

(iii) A copy of the order discharging or holding the defendant;

(iv) Every article, writing, money, or other exhibit received in evidence; provided, however, that such articles, writings, money or other exhibits so used in evidence before said magistrate be returned to the owner thereof upon written order of the judge of the court having jurisdiction to try the defendant;

(v) Any magistrate who refuses or fails to transmit the papers and articles so mentioned may be ordered to do so by the court having trial jurisdiction of the offense charged, and if he disobeys such orders may be held for contempt.

(2) If the record, or any part thereof, of the proceeding is transcribed and filed, the magistrate shall at such time transmit such record to the clerk of the court having trial jurisdiction of the offense.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of _____, 198___, I did serve the requisite number of copies of the foregoing on the Attorney for Billy Battles, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Myron Allenstein
Attorney at Law
141 So. Ninth Street
Gadsden, Alabama 35901

_____
JOSEPH G L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

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